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Nos. 02-1238, 02-1386, 02-1405

In the

Supreme Court of the United States

JEREMIAH W. NIXON, FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, and SOUTHWESTERN BELL TELEPHONE, L.P.,

Petitioners,

v.

MISSOURI MUNICIPAL LEAGUE, MISSOURI ASSOCIATION OF MUNICIPAL UTILITIES, AMERICA PUBLIC POWER ASSOCIATION, CITY UTILITIES OF SPRINGFIELD, CITY OF SIKESTON BOARD OF MUNICIPAL UTILITIES, and CITY OF COLUMBIA WATER & LIGHT,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below correctly held that Congress intended the term "any entity" in Section 253(a) of the Telecommunications Act of 1996, 47 U.S.C. § 253(a), be interpreted broadly so as to protect both public and private entities from state barriers to entry into the competitive marketplace of telecommunications services.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents state that the Missouri Municipal League, the Missouri Association of Municipal Utilities, and the America Public Power Association are not-for-profit trade associations that represent the interests of public entities. None has stock owned by a parent corporation. Respondents City Utilities of Springfield, City of Sikeston Board of Municipal Utilities and City of Columbia Water & Light are units of local government in Missouri.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Missouri Attorney General Jeremiah W. Nixon, on behalf of the State of Missouri; the Solicitor General of the United States, on behalf of the Federal Communications Commission; and Southwestern Bell Telephone, L.P., have filed separate petitions seeking review of *Missouri Municipal League v. Federal Communications Comm'n.*, 299 F.3d 949 (2002). In that decision, the United States Court of Appeals for the Eighth Circuit held that the term "any entity" in Section 253(a) of the Telecommunications Act protects both private and public entities from state barriers to entry.

The three petitions make essentially the same arguments: (1) that the Eighth Circuit's judgment in *Missouri Municipal League* is in "direct conflict" with the earlier judgment of the United States Court of Appeals for the District of Columbia Circuit in *City of Abilene, Texas v. Federal Communications Comm'n.*, 164 F.3d 49 (D.C. Cir. 1999); (2) that the issue in these cases is one of substantial national significance; and (3) that the Eighth Circuit's judgment was incorrect on the merits.

Respondents, the Missouri Municipal League, *et al.*, agree that the Eighth Circuit and the D.C. Circuit reached different conclusions on whether "any entity" encompasses public entities. Respondents also agree that this is an important issue. Respondents do not agree, however, that *Missouri Municipal League* was incorrectly decided or that immediate Supreme Court review is necessary.

As discussed below, it is questionable whether any court, including the D.C. Circuit, will follow *Abilene* in the future. That is so because every court that has

subsequently conducted an independent analysis of the relevant issues has found that the *Abilene* court's analysis was incorrect and irreconcilable with decades of controlling Supreme Court precedents, particularly the Court's unanimous decision in *Salinas v. United States*, 522 U.S. 52 (1997).

Furthermore, contrary to the Petitioners' suggestion, this case does not pose serious issues of federalism. It is settled that, in matters affecting interstate commerce, Congress has authority under the Commerce Clause to preempt "traditional" or "historical" state powers. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47 (1984). Thus, the issue here is purely one of statutory construction – whether Congress in fact exercised that authority in Section 253(a). *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

For these and the other reasons discussed below, the seeming conflict in this case is considerably less important than the Petitioners maintain, and it is clearly not one that "can be effectively resolved only by the prompt action of the Supreme Court alone."[1] Thus, respondents urge the Court to deny the petitions and leave it to the lower courts to lay *Abilene* to rest.

STATEMENT

A century ago, when electric power emerged in the United States, the private sector focused first on

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[1] R. Stern, E. Gressman, S. Shapiro and K. Geller, Supreme Court Practice at 227 (8th ed. 2002), quoting Justice Harlan, Some Aspects of the Judicial Process of the United States Supreme Court, 33 AUSTL. L.J. 108 (1959).

electrifying the most densely populated and lucrative population centers and left much of America literally in the dark, particularly rural areas. R. Rudolph and S. Ridley, *Power Struggle: The Hundred Year War Over Electricity* at 30-31 (1986); D. Nye, *Electrifying America* at 26-27 (1990). Recognizing that electrification was critical to their economic development and survival, thousands of communities that were not large enough or profitable enough to attract private power companies created their own electric utilities. Public power utilities also emerged in several large cities, in which residents believed that competition was necessary to lower prices, raise the quality of service, or both. *Power Struggle*, at 32-38. Approximately 2,000 public power utilities continue to exist and thrive today.

In the mid-1990s, Congress overhauled the Nation's telecommunications laws, in part to stimulate deployment of advanced telecommunications services and capabilities to all Americans as rapidly as possible. While expressing a preference for private-sector leadership in this effort, Congress was well aware that the private sector could not meet this challenge alone and that public entities had a critical role to play in achieving the Nation's telecommunications goals. Senator Trent Lott (R-MS), a Senate manager of the Act, succinctly summarized Congress's understanding and intent as follows: "I think the rural electric associations, *the municipalities*, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here."[2]

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[2] *Hearings on S. 1822, The Communications Act of 1994*, Before the Senate Committee on Commerce, Science and

Congress did indeed develop the right language, including Section 253(a) of the Telecommunications Act: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service" (emphasis added). As Respondents showed in their briefs to the Eighth Circuit, the congressional intent reflected in Senator Lott's statement can be traced directly into the "any entity" language of Section 253(a).

REASONS FOR DENYING THE PETITIONS

I. IMMEDIATE SUPREME COURT REVIEW IS UNNECESSARY

Respondents acknowledge that the D.C. Circuit in *Abilene* and the Eighth Circuit in *Missouri Municipal League* reached opposite conclusions about whether the term "any entity" in Section 253(a) of the Telecommunications Act covers public entities. It is also true that a number of lower courts, including two state supreme courts in the Eighth Circuit, have divided over this question. It does not follow, however, that immediate Supreme Court review is necessary. To the contrary, a closer examination of the timing and content of these cases indicates that the apparent conflict is well on its way to resolving itself without Supreme Court review. In fact, it is questionable whether any court, including the D.C. Circuit itself, will follow *Abilene* in the future.

Transportation, 103d Cong, 2d Sess., A&P Hearings S.1822 (Westlaw) at *378-79 (emphasis added).

The FCC first addressed whether the term "any entity" covers public entities in response to a preemption petition filed by the City of Abilene, Texas. The City alleged that Southwestern Bell had refused to upgrade its telecommunications infrastructure and services to support the City's economic development plans, that the City wanted to build its own telecommunications network to provide or facilitate competition for Southwestern Bell, and that a Texas law that barred municipalities and municipal electric utilities from providing telecommunications services to the public directly or indirectly effectively prohibited the City from doing so.

On October 1, 1997, the FCC denied Abilene's petition. *Public Utility Commission of Texas*, 13 FCC Rcd. 3460, 1997 WL 603179 (1997) (*Texas Preemption Order*). Finding that the Texas statute was an exercise of "fundamental" or "traditional" state powers, the FCC stated that its decision was governed by *Gregory v. Ashcroft*, 501 U.S. 457 (1991), which precludes the federal government from preempting state action in the absence of a "plain statement" in the statute or legislative history that Congress intended that result. *Id.* at ¶ 188. In the FCC's view, the term "any entity" in Section 253(a) did not go far enough to meet the *Gregory* standard. *Id.* at ¶ 173.

While denying preemption, the FCC observed that the Texas statute was unwise and unnecessary, and it urged other states not to do what Texas had done. *Id.* at ¶ 190. The FCC also expressly limited its decision to municipalities, such as Abilene, that do not operate their own municipal electric utilities. "[W]e do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications

services by a municipally-owned electric utility." *Id.* at ¶ 179.

Abilene appealed the FCC's decision to the D.C. Circuit. Among other points, Abilene's brief included a lengthy discussion of the legislative history of Section 253(a). In its opposing brief, the FCC conceded that the legislative history contains numerous references to municipal electric utilities, but it insisted that these references were irrelevant because the *Texas Preemption Order* did not address the rights of municipal electric utilities.[3] At oral argument, the FCC assured the court that the agency would deal with that issue fully and fairly in a proceeding involving a Missouri statute then pending before the agency.

While the *Abilene* appeal was pending, this Court decided the *Salinas* case. In *Salinas*, a state official claimed that *Gregory* required a narrow reading of the phrase "any business or transaction" in the federal bribery statute, as a broad interpretation would unduly disturb the federal-state balance. The Court rejected this argument:

> The enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpretation that federal funds must be affected to violate § 666(a)(1)(B).... The prohibition is not confined to a business or transaction which affects federal funds. *The word "any," which prefaces the*

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[3] The relevant pages of the FCC's brief to the D.C. Circuit can be found online at the FCC's website, at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=2142190001.

> *business or transaction clause, undercuts the attempt to impose this narrowing construction.*

Id. at 57, citing *United States v. James*, 478 U.S. 597, 604-605, and n. 5 (1986); *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529 (1947) (emphasis added).[4]

The Court then went on to make clear that this decades-old rule of construction of the term "any" applies with full force in cases governed by *Gregory*'s "plain statement" standard:

> As we held in [*United States v.*] *Albertini*, [472 U.S. 675,] at 680, 105 S.Ct., at 2902 [(1985)].
>
> "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution.
>
> These principles apply to the rules of statutory construction we have followed to give proper respect to the federal-state balance. As we observed in applying an analogous maxim in *Seminole Tribe of Florida v. Florida*, "[w]e cannot press

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[4] The Court's willingness to read "any" expansively in *Salinas* is all the more noteworthy because criminal statutes are ordinarily interpreted narrowly.

> statutory construction to the point of disingenuous evasion even to avoid a constitutional question." (internal quotation marks omitted). *Gregory* itself held as much when it noted the principle it articulated did not apply when a statute was unambiguous. *See Gregory*, 501 U.S., at 467, 111 S.Ct., at 2404. A statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be "plain to anyone reading the Act" that the statute encompasses the conduct at issue.
>
> *The plain-statement requirement articulated in Gregory and McNally does not warrant a departure from the statute's terms. The text of § 666(a)(1)(B) is unambiguous on the point under consideration here, and it does not require the Government to prove federal funds were involved in the bribery transaction.*

Salinas, 522 U.S. at 59-60 (emphasis added) (citations omitted).

Having found the text of the statute "unambiguous," the Court turned to the legislative history, not for confirmation that Congress intended that "any" be interpreted expansively, but for compelling evidence that Congress did *not* intend an expansive construction: "'[O]nly the most extraordinary showing of contrary intentions' in the legislative history will justify a departure from [the language in issue].'" *Id.* at 57-58, quoting *Albertini*, 472 U.S. at 680.

Although the *Abilene* petitioners relied heavily upon *Salinas* in their reply brief and oral argument, the D.C. Circuit did not follow or even mention *Salinas* in its opinion. Instead, it affirmed the *Texas Preemption Order* on the grounds that *Gregory* required more than a mere linguistic possibility that "any entity" covered public entities, that the court could not discern the "tone of voice" that Congress had used when it wrote those words, and that Abilene had presented "nothing else" to confirm that Congress intended the term "any entity" to apply to public entities. *Abilene*, 164 F.3d at 52.

The D.C. Circuit did not attempt to reconcile its interpretation with the pro-competitive purposes of the Telecommunications Act, nor did it even discuss the statutory objectives. The court brushed aside the legislative history in a footnote at the end of its decision – "Abilene fails to acknowledge that the statements it quotes deal with an issue not before us – whether public utilities are entities within § 253(a)'s meaning." *Abilene*, 149 F.3d at 53 n.8.

Within months of the D.C. Circuit's decision in *Abilene*, two state courts embraced it – *Iowa Telephone Ass'n. v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999), and *Municipal Electric Authority of Georgia v. Georgia Public Service Commission*, 525 S.E.2d 399 (Ga. App. 1999). Neither court performed an independent analysis of the underlying issues; both courts simply deferred to the FCC as the federal agency responsible for administering the federal telecommunications laws.[5]

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[5] The Iowa court had little incentive to perform an independent analysis, as it found a different ground on which to overturn the State's ban on municipal telecommunications services.

On January 12, 2001, the FCC issued its decision in the Missouri case. Finding that municipal electric utilities were indistinguishable from municipalities under Missouri law, the FCC concluded that *Abilene* had disposed of the rights of municipal electric utilities after all. The five FCC commissioners unanimously deplored this result, but they concluded that *Abilene* tied their hands:

> While the legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition, we reiterate the Commission's urging in the *Texas Preemption Order* that states refrain from enacting absolute prohibitions on the ability of municipal entities to provide telecommunications service. The Commission has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities. We emphasized this fact in our August 2000 report on the deployment of advanced services. In that report, we presented a case study detailing advanced services deployment in Muscatine, Iowa where the municipal utility competes with other carriers to provide advanced services to residential customers. We noted that the degree of advanced services deployment in

> Muscatine, which has three facilities-based, high-speed service providers for residential customers, including the municipal utility, is due in part to Iowa's legal environment, which has encouraged municipal involvement in the deployment of advanced telecommunications services. Our case study is consistent with APPA's statements in the record here that municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities. We are also encouraged by the comments of Missouri River, which states that it is comprised of municipally-owned utilities that serve communities with populations of less than five thousand people in Iowa, Minnesota, North Dakota and South Dakota, and that its members have installed fiber optic facilities that they could use to provide telecommunications services in markets where there are currently no competitive alternatives.

In re Missouri Municipal League, et al., 16 FCC Rcd 1157, 2001 WL 28068 ¶ 10 (rel. January 12, 2001) (*Missouri Preemption Order*). Three of the five commissioners also wrote separate statements underscoring their dissatisfaction with the anti-competitive effects of the decision. *Id.*

On May 16, 2001, the tide turned. In *City of Bristol v. Earley*, 145 F.Supp.2d 741 (W.D. Va. 2001) (vacated as moot upon enactment of corrective legislation), the federal district court carefully examined the underlying statutory issues and found that "any entity" does indeed cover public entities.[6] In the key passage of its decision, the court stated:

> The Supreme Court has held that the use of the modifier "any" in a federal statute precludes a narrow interpretation of the law's application. *See Salinas v. United States*, 522 U.S. 52, 57, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997); *see also United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) ("Read naturally, the word 'any' has an expansive meaning ...."). Specifically, the Court has held that where Congress uses unambiguous statutory language, such as the word "any," it has expressed a "clear and manifest" intent to preempt a traditional area of state law, satisfying *Gregory*, 501 U.S. at 461, 111 S.Ct. 2395. *See Salinas*, 522 U.S. at 60, 118 S.Ct. 469. ("The plain-statement requirement articulated in

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[6] *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), holds that a court should defer to an agency's interpretation of a statute only if the court first independently determines that Congress has not spoken to the precise matter in issue and that the statute is ambiguous or silent on that issue. That determination is one that the court must make for itself, applying the traditional tools of statutory construction, and unaided by the agency's interpretations. These tools include the language, structure, purposes and legislative history of the statute. *Id.* at 842-43

> *Gregory* ... does not warrant a departure from the statute's terms.").

Bristol, 145 F.Supp.2d at 747. The district court also carefully examined, and ultimately rejected, the D.C. Circuit's analysis in *Abilene*. In particular, the *Bristol* court took issue with the D.C. Circuit's point that it could not hear Congress's "tone of voice," as the fact "[t]hat judges are unable to hear certain tonal emphases of a legislature has never been an obstacle to statutory interpretation." *Id.* at 749. The court also stated that, "[w]here the plain and ordinary meaning of a statute gives a 'straightforward statutory command, there is no reason to resort to legislative history.' Nevertheless, the legislative history here supports a broad, rather than narrow, interpretation." *Bristol*, 145 F.Supp.2d at 748 (citation and footnote omitted).

Next, in *Missouri Municipal League*, the Eighth Circuit followed *Bristol's* lead and carefully examined the relationship between *Gregory* and the Supreme Court's precedents on interpreting the modifier "any," particularly *Salinas*. *Missouri Municipal League*, 299 F.3d at 952-55. While affording "all due deference to our sister circuit's holding, and mindful of our desire to maintain uniformity among the circuits," *id.*, the Eighth Circuit found that *Abilene* was simply not persuasive:

> Whatever the reason for the D.C. Circuit's decision not to consider and discuss *Salinas* and like cases, we view the lack of such a discussion as detracting from the persuasiveness of its opinion. The Supreme Court has repeatedly instructed us regarding the proper manner of interpreting the modifier "any," and we follow that direction here. We find no

> reference in any of the Supreme Court's decisions regarding the word "any" about Congress's "tone of voice" and "emphasis."

Id. at 955.

After the Eighth Circuit panel rendered its decision, the FCC and Southwestern Bell sought reconsideration or reconsideration *en banc*, asserting that the panel had failed to address two post-argument Supreme Court cases –*Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002) and *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 122 S.Ct. 2226 (2002). At the court's request, the Missouri Municipal League responded, showing that *Raygor* and *Columbus* were consistent with the panel's ruling. The court denied reconsideration.

Most recently, the Supreme Court of Nebraska held in *In Re: Application of Lincoln Electric System*, 655 N.W.2d 363 (Neb. 2002), that the term "any entity" encompasses public entities and that the D.C. Circuit's analysis in *Abilene* was incorrect. *Lincoln Electric* may be particularly useful in predicting what courts will do in the future because the Nebraska Supreme Court was not bound by either *Abilene* or *Missouri Municipal League* and elected to follow the latter simply because it was the better reasoned decision. "[W]e are persuaded by the reasoning of the Eighth Circuit that under the rule of statutory construction applied by the Supreme Court in *Salinas*, and other cases, Congress' use of the phrase 'any entity' in § 253(a) is indicative of an expansive statutory scope which includes a governmental entity, such as a municipally owned utility, seeking to provide telecommunications services." *Id.* at 371-72 (citation omitted).

Two additional considerations suggest that even the D.C. Circuit might decline to follow *Abilene* in the future. First, as indicated, the *Abilene* court did not attempt to reconcile its interpretation of "any entity" with the pro-competitive purposes of the Telecommunications Act. It is possible that the court failed to do so because this Court had not yet issued its key ruling on the proper allocation of authority under the Telecommunications Act between the federal government and the States. That occurred twenty days after *Abilene* was decided, in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). In that case, this Court reversed two decisions in which the Eighth Circuit had held that the FCC's Interconnection Order unduly intruded upon State authority over local telecommunications matters. *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), and *State of California v. FCC*, 124 F.3d 934 (8th Cir. 1997).[7]

On behalf of the majority, Justice Scalia forcefully dispelled any doubt about the primacy of federal law under the Act:

> The question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.

Iowa Utilities Board, 525 U.S. at 378 n.6. Elsewhere, Justice Scalia noted:

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[7] In one of these cases, the Eighth Circuit had found that the FCC crossed over a fence that was "hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf." *Iowa Utilities Board*, 120 F.3d at 800.

> The 1996 Act can be read to grant (borrowing a phrase from incumbent GTE) "most promiscuous rights" to the FCC vis-à-vis the state commissions and to competing carriers vis-à-vis the incumbents – and the Commission has chosen in some instances to read it that way.

Id. at 396.

Notably, two of the judges on the panels of the Eighth Circuit cases that this Court reversed in *Iowa Utilities Board* (Judges Wollman and Bowman) were also on the panel that decided *Missouri Municipal League*. Thus, the *Missouri Municipal League* panel unquestionably approached the "any entity" issue, not just with a high degree of respect for state sovereignty, but also with an acute awareness of the strength of this Court's views about federal supremacy vis-à-vis the States in achieving the pro-competitive purposes of the Telecommunications Act. With this Court's *Iowa Utilities Board* decision in hand in a future case, the D.C. Circuit's approach to the "any entity" issue might well mirror that of the Eighth Circuit.[8]

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[8] In *Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997), the D.C. Circuit declined to defer to an unduly restrictive interpretation of the term "entity" in 47 U.S.C. § 275, finding that the FCC's decision reflected "no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in telecommunications." On remand, the FCC found that "entity" should be interpreted expansively when necessary to achieve the pro-competitive purposes of the Telecommunications Act; that such an interpretation is "consistent with the idea that 'entity' is 'the broadest of all definitions which relate to bodies or units,'" that such a broad interpretation is "reflected in judicial and statutory definitions of 'entity' in other contexts;" and that "entity"

Second, as also indicated above, the D.C. Circuit decided *Abilene* on the understanding, which the FCC had fostered, that the court's decision would not adversely affect the rights of municipal electric utilities. "Abilene fails to acknowledge that the statements it quotes [from the legislative history] deal with an issue not before us – whether public utilities are entities within § 253(a)'s meaning." *Abilene*, 149 F.3d at 53 n.8. Had the D.C. Circuit anticipated that the FCC would subsequently insist that *Abilene* had indeed disposed of the rights of municipal electric utilities, despite the court's explicit statement that it was *not* doing so, the D.C. Circuit might well have viewed *Abilene* in a wholly different light. In the future, it would undoubtedly do so.

In summary, the D.C. Circuit arrived at the wrong conclusion in *Abilene* because it asked the wrong question. Under *Gregory*, as clarified by *Salinas*, Congress's unqualified, expansive use of "any entity" in Section 253(a) was a "plain statement" on the face of the Telecommunications Act that Congress intended to protect all entities, including public entities, from state barriers to entry. The force of that statement could be undermined only if other language in the Act or the legislative history compelled a narrowing construction. Thus, the D.C. Circuit should have asked, "Is there any such narrowing language in the statute or legislative history?" The answer to that question would clearly have been "No," as the language, structure, purposes and legislative history all support the conclusion that Congress intended that the term "any entity" cover

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includes "a division of a government bureau...." *In the Matter of Enforcement of Section 275(A)(2) of the Communications Act of 1934, As Amended By the Telecommunications Act of 1996, Against Ameritech Corporation*, 13 FCC Rcd 19046, ¶¶ 10, 16 (September 25, 1998).

public entities. Instead, the D.C. Circuit looked for a *second* plain statement that would *confirm* that Congress really meant what it said when it used the term "any entity" without restriction. As the *Bristol*, *Municipal League*, and *Lincoln Electric* courts concluded, and as other courts are likely to conclude in the future, the *Abilene* court's approach was incompatible with *Salinas* and other Supreme Court precedents and simply wrong.[9]

To be sure, it is possible that the D.C. Circuit or some other circuit court may follow *Abilene* in the future. If that occurs, a conflict requiring Supreme Court review will indeed be present. For now, however, one can only speculate that this will occur. In these circumstances, the Court should deny the petitions.

II. THE PETITIONERS HAVE FAILED TO SHOW THAT *MISSOURI MUNICIPAL LEAGUE* WAS INCORRECTLY DECIDED

As shown in the previous section, this case is governed by *Salinas* and the nearly six decades of similar Supreme Court precedents on which the Eighth Circuit relied in *Missouri Municipal League*. The Petitioners have offered no persuasive arguments to support a contrary conclusion.

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[9] In *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), this Court held that the term "any other final action" must be interpreted broadly, observing that "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Id.*, 446 U.S. at 592. That is what the D.C. Circuit did here.

First, the Petitioners do not, and cannot, dispute the fact that this Court *unanimously* and *explicitly* held in *Salinas* that the Court's long-standing rule of construction of "any" applies in cases governed by *Gregory*'s plain-statement standard. The State of Missouri does not mention *Salinas* at all in its petition. The FCC quotes *Salinas* but offers no comment on it. FCC Petition at 6-7. Southwestern Bell does discuss *Salinas*, but it ignores this point. Southwestern Bell's Petition at 16.

Second, *Salinas* itself refutes the suggestion at page 16 of Southwestern Bell's petition that the Court decided the *Salinas* case as it did only because it believed that a broad interpretation of the federal bribery law would not intrude upon state sovereignty. To the contrary, the *Salinas* Court made clear that courts should not disingenuously evade giving effect to a clear expression of congressional intent just to avoid disturbing the federal-state balance. *Salinas*, 522 U.S. at 59. Furthermore, the Eighth Circuit did not hold, as Southwestern Bell maintains, that *Salinas* requires that "any" be interpreted expansively in all cases. Southwestern Bell Petition at 16. The Eighth Circuit was well aware that *Salinas* held only that "any" must be interpreted broadly only if no other language in the statute or legislative history requires a narrowing construction. The Eighth Circuit did not interpret the term "any entity" in a vacuum, as the D.C. Circuit did in *Abilene*, but with due regard for the pro-competitive purposes of the Telecommunications Act. *Missouri Municipal League*, 299 F.3d at 951-52. Indeed, the Eighth Circuit quoted the FCC's own findings to that effect. *Id.* at 952.[10]

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[10] Notably, none of the Petitioners pressed the arguments on which the FCC actually relied in rebuffing *Salinas* in its *Missouri Preemption Order*, at ¶ 14 n.49. The FCC's first argument – that

Third, as the Respondents demonstrated to the Eighth Circuit, this Court's recent *Raygor* and *City of Columbus* decisions are not inconsistent with the conclusion that "any entity" includes public entities. In *Raygor*, the Court declined to read "any claim" in the federal tolling statute broadly enough to cover state-law claims against non-consenting states that had been dismissed on Eleventh Amendment grounds. Believing that "the particular context" of the provision at issue made Congress's intent unclear, the Court invoked the "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Raygor*, 534 U.S. at 545-46, quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). In contrast to the murky statutory context in *Raygor*, the Telecommunications Act's language, structure, purposes and legislative history all compel the conclusion that "any entity" includes public entities.

Similarly, in *City of Columbus* the Court merely reiterated its long-standing view that municipalities are not sovereign entities that are independent of the states from which they derive their authority. *City of*

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other language in the federal bribery statute supported a broad reading of "any business or transaction" – missed the *Salinas* Court's point that a court must interpret "any" expansively unless other language in the statute or legislative history is *inconsistent* with that construction. The FCC's second argument – that, unlike the federal bribery statute, "section 253(a) is susceptible of more than one interpretation, as the D.C. Circuit already determined in *Abilene*" – was insistent the *Salinas* Court's statements that Congress's unrestricted, expansive use of "any" creates no ambiguity and that "a statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas*, 522 U.S. at 60.

Columbus, 122 S.Ct. at 2228. That point, however, as the Eighth Circuit correctly held, is not germane to whether a unit of local government is an "entity" as that term is used in Section 253(a). *Missouri Municipal League*, 299 F.3d at 953. Furthermore, as the Court made clear in *Sailors v. Board of Educ.*, 387 U.S. 105, 109 (1967), the "vast leeway" that states have in managing their political subdivisions ends at the point that state management "runs afoul of a federally protected right." Here, the Supremacy Clause and Section 253(a) furnish local governments such a federally protected right.

Fourth, the FCC suggests in its petition that *Abilene*'s construction of Section 253(a) is the "better view" because "[t]he term "entity" "bears different meanings depending upon the context." FCC Petition at 13, quoting *Southern Co. Servs., Inc.* v. *FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002). The FCC misses the point that "entity" does not stand alone in Section 253(a) but is preceded by the unqualified and expansive modifier "any." Accordingly, the rule of statutory construction articulated in *Salinas* – which the FCC does not challenge here – comes into play.

Finally, the State of Missouri, Southwestern Bell and certain *amici curiae* contend that the Eighth Circuit erred for various policy reasons. The short answer to this is the one that the Eighth Circuit gave: "*Gregory* does not mandate that we conduct a balancing test of the federal interests against the state interests or that we delve into the wisdom of the competing federal and state policies. ... [W]e ask a single question, is the statute's meaning plain? If so, that ends our analysis, with the result that it must be held that Congress has preempted state law." *Missouri Municipal League*, 299 F.3d at 953. In any event, if policy questions are relevant

here, the FCC definitively answered them when it found in its Texas and Missouri preemption orders that municipal entry can significantly advance the pro-competitive objectives that Congress sought to achieve in enacting the Telecommunications Act.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petitions for writs of certiorari.

Respectfully submitted,

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